Supreme Court, U.S.
FILED
SEP 28 2000
CLERK

(2)

No. 00-316

In The

Supreme Court of the United States

ROBERT SCHEIDING, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRACE, GENSON, COSGROVE & SCHIRM, P.C.
PHILIP R. COSGROVE
THOMAS H. HUTCHINSON
DAVID K. SCHULTZ
444 South Flower Street, Suite 1100
Los Angeles, CA 90071
(213) 533-5400

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
DAVID M. HEILBRON*
LESLIE G. LANDAU
ROBERT A. BRUNDAGE
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Attorneys for Respondent General Motors Corporation
**Counsel of Record*

September 28, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33pp

STATEMENT OF PARTIES

The Petition incorrectly describes the parties in the court below. *Goodyear* and *Hellquist* are wrongful death and survival suits. Harry Goodyear and Victor Hellquist were not parties. *See* App. 2a n.1.

Respondent General Motors Corporation was one of numerous defendants in the trial court. It was the respondent (appellee) in the California Court of Appeal and the California Supreme Court. Pursuant to Supreme Court Rule 29.6, GM states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

STATEMENT OF PARTIES i

DISPUTED JURISDICTION 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 6

A. There Is No Conflict Among The Lower Appellate Courts 13

B. The First Hole: Preemption Only Where The Federal Regulators Have Acted 16

C. The Second Hole: Common-Law Claims Against Manufacturers 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521 (1925) 9

Burlington Northern, Inc. v. Henry, 457 U.S. 1101 (1982) 14

Carter v. Consolidated Rail Corp., (Ohio App. 1998) 709 N.E.2d 1235, *app. denied*, 694 N.E.2d 75 (Ohio 1998) 11, 15

Cates v. Consolidated Rail Corp., 653 N.E.2d 1229 (Ohio App. 1995), *app. denied*, 649 N.E.2d 839 (Ohio 1995) 11

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 19

Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm., 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.) 10, 12, 15, 18

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) 14, 18, 19

English v. General Elec. Co., 496 U.S. 72 (1990) 18

First Security Bank v. Union Pac. R.R., 152 F.3d 877 (8th Cir. 1998) ..... *passim*

Furlough v. Union Pac. R.R. Co., ___ So.2d ___, 2000 WL 1230592 (La.App. Aug. 31, 2000) 11, 15

Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) 19

Green v. River Terminal Ry., 585 F. Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985) 11

TABLE OF AUTHORITIES – Continued

Page

Henry v. District Court, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982) 13, 14

Hicks v. Miranda, 422 U.S. 332 (1975) 15

Hines v. Smith, 275 F. 766 (7th Cir. 1921) 11

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 20

Keene Corp. v. United States, 508 U.S. 200 (1993) 15

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) ..... *passim*

Lorillard v. Pons, 434 U.S. 575 (1978) 15

Lorincie v. Southwestern Pennsylvania Transp. Authority, 34 F. Supp. 2d 929 (E.D. Pa. 1998) 21

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) ..... *passim*

Mickleson v. Montana Rail Link, Inc., 999 P.2d 985 (Mont. 2000) 13, 14

Missouri Pac. R.R. v. Porter, 273 U.S. 341 (1927) 18

Missouri Pac. R.R. v. Railroad Comm., 833 F.2d 570 (5th Cir. 1987) 11, 13, 17

Missouri Pac. R.R. v. Railroad Comm., 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989) 5, 11, 13

Napier v. Atlantic Coast R.R., 272 U.S. 605 (1926) ..... *passim*

Norfolk and Western Railway Company v. Pennsylvania Public Utility Commission, 413 A.2d 1037 (Penn. 1980) 14

TABLE OF AUTHORITIES – Continued

Page

Oglesby v. Delaware & Hudson Ry., 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 498 (1999) ... *passim*

Penn Central Co. v. Department of Public Utilities, 253 N.E.2d 339 (Mass. 1969) 16

Pennsylvania R.R. v. Pub. Service Comm., 250 U.S. 566 (1919) 7

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 19

Seaman v. A.P. Green Indust., Inc., 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 5, 11, 13

Southern Pac. Transp. Co. v. Oregon Pub. Util. Comm., 9 F.3d 807 (9th Cir. 1993) 8

Southern Ry. v. Lunsford, 297 U.S. 398 (1936) 9

Springston v. Consol. Rail Corp., 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) ... *passim*

Taylor AG Indust. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 22

United States v. Baltimore & Ohio R.R., 293 U.S. 454 (1935) 10

United States v. Locke, 120 S. Ct. 1135 (2000) 8, 18

United Transp. Union v. Long Island R. R. Co., 455 U.S. 678 (1982) 18

Urie v. Thompson, 337 U.S. 163 (1949) 9, 10

Washington v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 484 P.2d 1146 (Wash. 1971) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2101(c) 1

28 U.S.C. § 2104 1

45 U.S.C. § 34 21

45 U.S.C. § 51, *et seq.* 9

49 U.S.C. § 20101, *et seq.* 12, 14, 15

49 U.S.C. § 20106 14

49 U.S.C. § 20701, *et seq.* 3

49 U.S.C. § 21302 ..... 21, 22

Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966) 6

OTHER AUTHORITIES

Federal Railroad Admin., *Locomotive Crashworthiness and Cab Working Conditions*: Report to Congress 12

H.R. Rep. No. 103-180, *reprinted in* 1994 U.S.C.C.A.N. 818 15

H.R. Rep. No. 205, 102d Cong., 2d sess., *reprinted in* 1992 U.S.C.C.A.N. 866 22

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104 15

Railroad Occupational Safety and Health Standards; Termination (1978) 43 Fed. Reg. 10,583, 10,585-86 8

RULES

Supreme Court Rule 10 21

Supreme Court Rule 13.1 1

Supreme Court Rule 13.3 1

Supreme Court Rule 22 1

Supreme Court Rule 29.5 1

Supreme Court Rule 29.6 i

Supreme Court Rule 30 1

REGULATIONS

49 C.F.R. § 1.49, *et seq.* 6

49 C.F.R. § 91.16 (1939) 11

49 C.F.R. § 91.253 (1939) 11

49 C.F.R. § 91.254 (1939) 11

49 C.F.R. § 229 12

49 C.F.R. § 229.7(b) 22

49 C.F.R. § 229.25(b) 11

49 C.F.R. § 229.41 11

49 C.F.R. § 229.43(a) 12

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. § 229.46, *et seq.* 12

49 C.F.R. § 229.77, *et seq.* 12

49 C.F.R. § 229.83..... 11

49 C.F.R. § 229.89..... 11

49 C.F.R. § 229.91..... 12

49 C.F.R. § 229.93, *et seq.* 12

49 C.F.R. § 229.103, *et seq.* 12

49 C.F.R. § 229.115, *et seq.* 12

49 C.F.R. § 230.0..... 22

DISPUTED JURISDICTION

The Petition incorrectly states that this Court has jurisdiction under 28 U.S.C. § 1254 (certiorari to federal court of appeals). (Pet. 1) Any jurisdiction would arise under 28 U.S.C. § 1257(a) (certiorari to state court of last resort). We respectfully submit, however, that the Court should decline to find jurisdiction because the Petition was not timely filed.

Absent a valid extension of time, a petition for a writ of certiorari must be filed within 90 days after the state court of last resort, having decided the case, denies rehearing. 28 U.S.C. §§ 2101(c), 2104; Supreme Court Rule 13.1, 13.3. The California Supreme Court denied rehearing April 12. The petition was filed over 90 days later on August 24. Accordingly, it is out of time unless the time was validly extended.

Petitioners applied to Justice O'Connor to extend the time to petition for a writ of certiorari. However, in violation of the Supreme Court Rules, GM never received service of any extension request, nor was a certificate of service filed with the extension request. *See* Supreme Court Rule 30 ("application to extend time to file a petition for writ of certiorari . . . shall be made to an individual justice and . . . served on all other parties"); 22 (application to individual justice "shall be accompanied by proof of service"); 29.5 ("proof of service, when required by these Rules, shall accompany the document

when it is presented to the Clerk for filing").[1] GM accordingly had no knowledge of the application, much less opportunity to respond.

Apparently unaware of the application's defect, the Court granted the extension. The order granting the extension was again not served on GM and GM did not know about it. GM was surprised to receive a Petition filed August 24, well over 90 days after the California Supreme Court's denial of rehearing. We respectfully submit that a Petition filed late, under an extension procured by stealth and in violation of the rules, should not be deemed timely.

SUMMARY OF ARGUMENT

As explained in the jurisdiction discussion above, the petition was filed more than 90 days after denial of the Petition for Rehearing, and there was no valid extension of time because the application for extension was not served. Accordingly, the Petition should be denied as untimely. Petitioners should not be rewarded for violation of rules grounded in fundamental fairness by consideration of the Petition.

There is no issue warranting review in any event. *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926),

[1] The Office of the Clerk of this Court confirmed to GM's counsel that there is no certificate of service of the application in the Court file.

holds that the Locomotive Inspection Act ("LIA"),[2] 49 U.S.C. §§ 20701-20903, occupies the field of all matters "within the scope of the authority delegated to" the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive and of all appurtenances." LIA therefore preempts any state law within that field. Whether federal regulators have addressed the matter, *Napier* holds, "is without legal significance." *Id.* Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable. Petitioners [illegible]d the court below *Napier* was "good law" and repeat here that they "do not disagree" that it holds LIA "occupies the field of regulating locomotive equipment." (Pet. 6)

That disposes of this case. Petitioners' state law claims attack the "design" and "material," *Napier*, 272 U.S. at 611, of locomotive components. They accordingly fall squarely within the Secretary's authority, and so within the preempted field. That is true, under *Napier*, whether the federal regulators have addressed asbestos (they have) or not. That is true, under a long line of this Court's precedent, whether the state law under which the duty imposed is common law or not. That is true, every appellate court to address the question holds, whether the claim is made against the railroad operator or the

---

[2] LIA was formerly known as the Locomotive Boiler Inspection Act, "LBIA" or "BIA".

manufacturer. For LIA speaks to "manufacturer[s] . . . of railroad equipment"; the preempted field is defined by the Secretary's authority and includes the "design" and "construction" of the locomotive and its parts, *id.*; the manufacturers who design and construct locomotives are accordingly at the center of that field; and as a practical matter state law imposing duties on manufacturers must be preempted, lest the uniformity federal law is designed to achieve be destroyed.

The California Supreme Court simply followed this Court's mandate in *Napier*, agreeing with a summary affirmance by this Court and every federal court of appeals or state court of last resort to reach these issues. *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (state could not impose failure-to-warn or design-defect liability, because warnings and designs are "within the scope of the Secretary's authority"; "Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment"); *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (states cannot impose liability for failure to install warning devices on locomotives because they are "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts common-law action claiming locomotive seat should be designed differently and accompanied by warning), *cert.*

denied, 120 S. Ct. 498 (1999); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Missouri Pac. R.R. v. Railroad Comm.*, 850 F.2d 264, 268-69 (5th Cir. 1988) (LIA preempts state requirement for telemetry devices), *cert. denied*, 488 U.S. 1009 (1989). Indeed, a New York trial court has recently held that LIA preempts asbestos claims – to our knowledge the only reported decision outside California respecting preemption of asbestos claims. *Seaman v. A.P. Green Indust., Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000).

Petitioners claim five state courts disagree. But they cite only four decisions, and those decisions are so far afield that petitioners did not even cite them below. Every supposedly conflicting case they cite has been superseded, is off point, or both. None supports the holes petitioners try to poke in *Napier*'s field.

In sum, plaintiffs do not challenge *Napier*, or LIA's field preemption, nor identify any on-point appellate case that quarrels with *Napier*'s application on the facts here. No court – none – has reached a holding that would allow petitioners' claims. There is nothing to review.

REASONS FOR DENYING THE PETITION

Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 611-13 (1926), holds that LIA grants federal regulators – the Interstate Commerce Commission and now its successor, the Secretary of Transportation, via the Federal Railroad Administration (FRA)[3] – exclusive authority over "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. Accordingly, LIA "occup[ies] the field" as to matters within federal authority under it, and so preempts all state law respecting matters in that field. The Court explained that state law "within the scope of the authority delegated to the Commission" by LIA, *id.*, is preempted regardless whether it also conflicts with a federal rule, or whether there is any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because [LIA] as we construe it,

---

[3] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall*, 720 F.2d at 1192. The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

> was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

Id. at 613 (emphasis added). The remedy, the Court held, for inadequate federal regulation was not state law, but a petition to the federal regulatory authority: "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

The reason for field preemption: locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R.R. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent

> state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law, 114 F.3d at 910-11 (quoting *Southern Pac. Transp. Co. v. Oregon Pub. Util. Comm.*, 9 F.3d 807, 811 (9th Cir. 1993)); *accord* App. 4a; *Oglesby*, 180 F.3d at 461; *Marshall*, 720 F.2d at 1153; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245. *Cf. United States v. Locke*, 120 S. Ct. 1135, 1149 (2000) ("Enforcement of the state requirements would . . . frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.") (citation omitted).

Indeed, Congress judged that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. As the FRA explained:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination 43 Fed. Reg. 10,583, 10,585-86 (1978). Thus, LIA leaves no room for ad hoc jury decisions about locomotives, their parts and use:

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521, 530 (1925) (emphasis added); *see* App. 10a-11a.[4]

---

[4] Congress also provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). Petitioners thus go down the wrong track in suggesting LIA should permit liability because it has sometimes been viewed as an amendment to FELA. (Pet. 17) FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated. Petitioners here brought FELA claims against their employer.

Napier's field preemption holding has been reaffirmed repeatedly by this Court. *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (*Napier* holds that LIA occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same). Indeed, petitioners conceded below that *Napier* was "good law"[5] and repeat here that they "do not disagree" that *Napier* holds that LIA "occupies the field of regulating locomotive equipment." (Pet. 6)

Petitioners in this case, railroad workers, claim that "asbestos materials" in GM's locomotives and locomotive parts (plus 199 other defendants' asbestos) caused them to contract asbestos-related illnesses,[6] and, proceeding on various state law tort theories such as strict liability, claim that the locomotives and their parts were defective in design because they contained asbestos. The California Supreme Court found those claims preempted. (App. 5a-6a) Its analysis applied *Napier* according to its terms, was absolutely right, and in accord with the law around the country.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances."[7] The asbestos-

---

[5] *See* Supplemental Opening Brief in California Supreme Court, at 5 n.2.

[6] Plaintiffs Goodyear and Hellquist claim wrongful death. The preemption analysis is the same whether the suit is brought by the employee or a survivor, so we refer to the employees in all cases as "petitioners."

[7] Thus, for example, LIA preemption covers: warnings, engines, brakes and insulation, *Law*, 114 F.3d at 909-10; speed recorders and indicators, *Consolidated Rail Corp. v. Pennsylvania*

containing components whose design petitioners challenge – insulation, steam generators, exhaust stacks, motors, and others – are locomotive "parts" and "appurtenances." Therefore, their design and materials are within the Secretary's authority and the preempted field. Indeed, the Secretary has issued and considered regulations respecting them, under authority of LIA, underscoring that they are within the Secretary's authority. Federal regulations under LIA govern, *inter alia*, insulation (49 C.F.R. §§ 229.25(b), 229.89, 229.41, 229.83[8]), motors (49

Pub. Util. Comm. 461 U.S. 912 (1983) (mem.), *aff'g*, 696 F.2d 981 (3d Cir. 1982), *aff'g*, 536 F. Supp. 653, 655 (E.D. Pa. 1982); warning lights and reflective tape, *Springston*, 130 F.3d at 243-45; *Marshall*, 720 F.2d at 1152; *Furlough v. Union Pac. R.R. Co.*, ___ So.2d ___, 2000 WL 1230592 (La.App. Aug. 31, 2000); *Carter v. Consolidated Rail Corp.* (Ohio App. 1998) 709 N.E.2d 1235, 1240, *app. denied*, 694 N.E.2d 75 (Ohio 1998); *Cates v. Consolidated Rail Corp.*, 653 N.E.2d 1229, 1236 (Ohio App. 1995), *app. denied*, 649 N.E.2d 839 (Ohio 1995); horns, *First Sec.*, 152 F.3d at 880-81; fire extinguishers and first-aid kits, *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); bell ringers, *Hines v. Smith*, 275 F. 766, 767 (7th Cir. 1921); radios, *Green v. River Terminal Ry.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); and of course fire boxes and cab curtains, *Napier*, 272 U.S. at 611-13. It also covers asbestos claims. *Seaman*, 707 N.Y.S.2d at 299. In short, "virtually all state regulations affecting the train itself appear preempted by federal law." *Missouri Pac. R.R.*, 850 F.2d at 268.

[8] Federal regulation of locomotive insulation in fact extends back before petitioners began working on locomotives in the 1940's. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation . . . shall be made and all defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

C.F.R. § 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. § 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab itself. (49 C.F.R. § 229.115-135).[9] Asbestos in those components is accordingly within the Secretary's authority too. Indeed, as petitioners acknowledge, the FRA considered asbestos regulation – confirming FRA's authority over locomotive asbestos – and decided to "take no regulatory action."[10] (Pet. 14 [emphasis omitted]) Since petitioners' claims attack locomotive parts' design and materials, the California Supreme Court held, the claims fall within the field and are preempted. (App. 5a-6a)

That was hardly new or radical. The decision below accords with a summary affirmance by this Court and every federal court of appeals or state court of last resort to reach the issue – including several petitioners do not mention. (*See* Pet. 10-11) *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.),

---

[9] They were also adopted under authority of the Federal Railroad Safety Act (49 U.S.C. §§ 20101-20144 ("FRSA"). *See* 49 C.F.R. § 229, Authority note (citing both LIA and FRSA sections of 49 U.S.C.).

[10] The Federal Railroad Administration determined that "there is no evidence that the presence of asbestos [in old locomotives] poses a problem to humans," that no "action with respect to the presence of asbestos in locomotive cabs is warranted," that existing Occupational Safety and Health Administration regulations were adequate "to ensure effective long-term management of asbestos," and that accordingly "no action be taken on the issue of asbestos in locomotives." Federal Railroad Administration, *Locomotive Crashworthiness and Cab Working Conditions* at 10-11 (1996).

aff'd, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.); *Marshall*, 720 F.2d at 1152; *Law*, 114 F.3d at 908; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245; *Oglesby*, 180 F.3d at 458; *Missouri Pacific.*, 850 F.2d at 268-69; *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985, 997 (Mont. 2000). *See also Seaman*, 707 N.Y.S.2d at 299 (LIA preempts asbestos claims).

Petitioners stretch to conjure conflict and to poke holes in LIA's field, but the arguments are tortured, and ultimately reveal a misunderstanding of preemption.

A. There Is No Conflict Among The Lower Appellate Courts.

Petitioners advise the decision below conflicts with "at least five" state-court decisions. They only cite four. (Pet. 11-12) Anyway, the conflict is contrived; indeed, petitioners did not even cite these cases to the courts below. All the decisions are superseded or off-point, or both; none involves asbestos; and all are 20 or more years old. They certainly have caused no confusion at all: there are two decades of unanimous circuit and state supreme court decisions starting with Justice (then Judge) Kennedy's decision in *Marshall*, 720 F.2d at 1152. The decision below, far from "increas[ing] the confusion" (Pet. 9), is in line with all of them.

We address briefly petitioners' supposedly conflicting cases:

> ***Henry v. District Court*, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982)** (cited in Pet. 11): *Henry* did not address field

preemption or even cite *Napier*.[11] The case from Montana that does – the decision this year in *Mickleson*, 999 P.2d at 997 – holds that LIA preempts a common law claim "within the scope of the authority delegated to the [Secretary of Transportation]." (following *Marshall*.). Petitioners omit that.

***Norfolk and Western Railway Company v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Penn. 1980), and *Washington v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 484 P.2d 1146 (Wash. 1971)**: These cases held the Federal Railroad Safety Act (49 U.S.C. §§ 20101-20144) ("FRSA") and its legislative history repealed LIA's field preemption. Even petitioners do not endorse that reasoning here, for they agree that *Napier* is "good law" and LIA "occupies the field." This Court summarily affirmed a district-court case that found both FRSA conflict preemption[12] and that as

---

[11] Plaintiff in *Henry* alleged that a railroad was negligent under state law in not equipping its locomotive with an oscillating headlight and strobe light. 645 P.2d at 1350. The court discussed preemption only under another act, the Federal Railroad Safety Act, and did not discuss LIA or even cite *Napier*. 645 P.2d at 1351, 1352. This Court lacked jurisdiction to correct the error. *Burlington Northern, Inc. v. Henry*, 457 U.S. 1101 (1982) (dismissing appeal).

[12] FRSA is not limited to locomotives, but broadly authorizes the Secretary of Transportation (through FRA) to issue regulations in the area of railroad safety generally. FRSA expressly preempts every state "law, regulation, or order," including "legal duties imposed . . . by the common law," relating to railroad safety where a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106; *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

to locomotives, LIA – alive and well – "completely preempts the field of locomotive equipment." *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.); *see* App. 6a-7a (explaining *Consolidated Rail*).[13] To our knowledge every case, state or federal, in the last 20 years agrees. *Marshall*, 720 F.2d at 1153 (FRSA expressly left LIA "intact, including its preemptive effect"); *Springston*, 130 F.3d at 245; *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 912 n.4; *Scheiding v. General Motors Corp.*, App. 6a; *Furlough v. Union Pac. R.R. Co.*, ___ So.2d ___, 2000 WL 1230592 (La. App. Aug. 31, 2000), *Carter v. Consol. Rail Corp.*, 709 N.E.2d 1235, 1240 (Ohio App. 1998), *app. denied*, 694 N.E.2d 75 (Ohio 1998).[14]

---

[13] That summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

[14] Congress has approved this Court's finding of LIA's field preemption. In 1970, Congress overhauled other aspects of railroad law but found LIA and five other laws "have served well" and "chose to continue them without change." (H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105, 4108) (accompanying Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20144). It specifically noted that under those approved laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field." *Id. See Marshall*, 720 F.2d at 1153. And in 1994, when Congress recodified LIA without substantive change, it specifically declined to "impair [ ] the precedent value of earlier decisions." H.R. Rep. No. 103-180, at 5 *reprinted in* 1994 U.S.C.C.A.N. at 822. Congress in recodifying the law thus "was aware of . . . earlier judicial interpretations and, in effect, adopted them." *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

> *Penn Central Co. v. Department of Public Utilities*, 253 N.E.2d 339 (Mass. 1969). This case stated that emergency tools and emergency lights fell outside LIA's preempted field, so state law could regulate them. *Penn Central*, 253 N.E.2d at 344. Right or wrong, that statement is off point. Petitioners do not dispute that the parts at issue here – such as motors, exhaust stacks, insulation, and brake shoes – fall squarely within LIA's field.

Thus, none of the cases petitioners cite really is on point, much less creates a conflict with current law, let alone support the holes petitioners try to poke in LIA's preempted field. We turn to those holes.

B. The First Hole: Preemption Only Where The Federal Regulators Have Acted.

Petitioners question whether LIA's field preemption covers state law "in areas where the federal government has not regulated the subject matter." They urge that federal law does not address asbestos, and reason that states may enter the preempted field as long as they do not "conflict with" federal regulations. (Pet. 14-16) The argument overlooks that FRA in fact has considered asbestos (n.10, above), but more fundamentally, confuses "field" and "conflict" preemption.

By definition, field preemption preempts all state law in the field whether the federal authority has been exercised or not. *Napier* itself explains. There, the ICC had not regulated fireboxes or cab curtains. States argued they could regulate because the ICC had not. This Court

responded: "This also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing" because LIA occupies the field. *Napier,* 272 U.S. at 613. *Napier* thus belies petitioners' claim that decisions finding preemption must involve subjects "expressly regulated" by federal law. (Pet. 10) *See also Oglesby,* 180 F.3d at 461 (the "relevant question" for LIA field preemption "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place"; claim re warnings on seats preempted where seats within federal authority, even where federal regulators had no specific seat warning regulations); *accord Springston,* 130 F.3d at 245 (same); *Law,* 114 F.3d at 910 (same); *Missouri Pac. R.R.,* 833 F.2d at 577 (state law respecting locomotive first aid kits and fire extinguishers preempted because LIA "wholly occupies the field of regulation of locomotive equipment"; no mention of on-point federal regulation).[15]

Thus "conflict" (Petition at 14) – the test for conflict, not field, preemption – has no place in a field preemption case. In *Napier,* states defended their laws against field preemption because they were not "inconsistent with" any federal requirement. This Court found field preemption even without any conflict – or even any regulation. 272 U.S. at 613. That is what field preemption means. *See*

---

[15] Some of these cases cited regulations to help show that plaintiffs' claims were "within the scope of the Secretary's authority" and so preempted. *E.g., Law,* 114 F.3d at 911. None suggested that state law may invade the field whenever federal regulators have decided not to regulate a subject – a proposition *Napier* plainly rejects. *See also* App. 13a.

also Missouri Pac. R.R. v. Porter, 273 U.S. 341, 346 (1927) (state law "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments" that occupy the field); *Locke,* 120 S. Ct. at 1151 (state law cannot enter preempted field even if allegedly "similar" or "supplement[ary]" to federal law, because federal regulators are "the sole source" of law). By definition, state law in the federal field conflicts with Congress' intent to keep state law out. *English v. General Elec. Co.,* 496 U.S. 72, 79-80 n.5 (1990). Petitioners urge that the case summarily affirmed by this Court – *Consolidated Rail,* 536 F. Supp. at 656-57 – found LIA preemption "because that equipment was the subject of federal regulations." (Pet. 11) Not so. The court held that LIA "preempts the field." *Consolidated Rail,* 536 F. Supp. at 655. Petitioners confuse that with the court's separate analysis concerning a different Act (FRSA) and conflict preemption under it, which does require an on-point federal regulation. *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993). *See* App. 12a-13a.

Petitioners' protest that the California Supreme Court ignored a "presumption against preemption." (Pet. 13) But as this Court held last term, no such presumption arises "when the State regulates in an area where there has been a history of significant federal presence." *Locke,* 120 S. Ct. at 1147-48. That is this case. Railroads have been "subject to comprehensive federal regulation for nearly a century" and there is "no comparable history of long-standing state regulation . . . of the railroad industry." *United Transp. Union v. Long Island R. R. Co.,* 455 U.S. 678, 687 (1982); *see* App. 12a. In any event, there is no

occasion for any such presumption where *Napier* already holds that LIA occupies the field. (App. 11a-12a)

Petitioners' confusion about the difference between field preemption and conflict preemption is no ground for review.

C. The Second Hole: Common-Law Claims Against Manufacturers.

Petitioners posit that *Napier*'s field does not include state regulation exercised through tort law, and that common law should be immune to preemption. (Pet. 16) They also argue that *Napier*'s field does not include state law directed at manufacturers. Both arguments again overlook the meaning of field preemption, and the unanimous case law supporting the California Supreme Court.

This Court has long held that preemption fully applies to common-law duties: "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). The Court has reaffirmed that rule earlier this year. *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1925-26 (2000) (products liability claim preempted). *Accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so impose "requirements or prohibitions"; quoting *Garmon* with approval); *CSX Transportation*, 507 U.S. at 675 (Federal Railroad Safety Act preempts negligence claim);

International Paper Co. v. Ouellette, 479 U.S. 481, 491-500 (1987) (common-law nuisance claims preempted).

The California Supreme Court, like every federal circuit court to consider the issue, found petitioner's common law claims, since within the occupied field defined by LIA and *Napier*, preempted. App. 13a-14a; *see Law*, 114 F.3d at 910-11 (common-law defect and failure to warn claim preempted); *Oglesby*, 180 F.3d at 462 (LIA preempts claim of design defect and failure to warn respecting locomotive seat); *Springston*, 130 F.3d at 244-45 (LIA preempts negligence claim against railroad and manufacturer for failure to install better warning devices); *First Security*, 152 F.3d at 880-81 (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall*, 720 F.2d at 1152 (LIA preempted negligence claim against railroad for failure to install better warning devices). There is nothing to review in that.

Petitioners protest that the state strict liability duties they seek to impose "did not exist" when LIA was enacted. (Pet. 18-19) They cite no case that permits avoidance of field preemption on that theory. For good reason. Congress occupied the field of locomotive parts and equipment and state law in that field is preempted, whether the law precedes the occupation or comes after it; Congress's occupation of the field does not invite new state law to intrude on it. In any event, *Napier* disposes of the argument. The state statutes there at issue were enacted after LIA, yet this Court found LIA preempted them. *Napier*, 272 U.S. at 607 (state statutes at issue were enacted in 1923 and 1924, after LIA occupied field).

Petitioners argue that their claims, although within the preempted field, are saved because brought against a manufacturer who made the engine rather than the operator who ran it. (Pet. 17-18) No appellate court has ever permitted avoidance of field preemption on that ground either. To the contrary, every federal circuit to consider the argument rejects it, and holds that LIA preempts claims state law directed at locomotive manufacturers when it seeks to regulate matters within the occupied field. *Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*); *see* App. 14a. Other than California – which agrees with the federal cases – no highest state court has reached the issue, to our knowledge.[16]

Those uniform rulings are right. First, LIA by its terms applies to manufacturers, contrary to petitioner's claim. (Pet. 17) LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994, 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49

---

[16] Petitioners cite a district court decision, *Lorincie v. Southwestern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929 (E.D. Pa. 1998), that defies the unanimous federal circuit authority and, in fact, relies on overruled decisions – the district court decision reversed by the Second Circuit in *Ogelsby* and a California case overruled by the state Supreme Court here. *See Lorincie*, 34 F. Supp. 2d at 932 n.3; *Ogelsby*, 180 F.3d at 462 (overruling district court decision relied on in *Lorincie*); App. 16a n.6 (overruling California court of appeal decision relied on in *Lorincie*). This Court does not ordinarily review claimed conflicts with district court decisions even if they are based on good authority. S. Ct. R. 10.

U.S.C. § 21302).[17] The 1994 recodification act omitted that as "surplus" (*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make clear that Congress intended no substantive change. Agency regulations reflect LIA's application to manufacturers; they penalize any "manufacturer . . . of railroad equipment . . . who violates any requirement of . . . the Locomotive Inspection Act" – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b), § 230.0 (similar).

Second, even if LIA did not specifically mention manufacturers, the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier*, 272 U.S. at 611. Manufacturers necessarily are at the center of that field; they design and construct locomotives.[18] If states could set standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts

---

[17] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made "explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety," codifying the way the FRA "currently interprets rail safety laws." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. *See also* n.12.

[18] Likewise, field preemption turns on whether the subject of the claim is within the preempted field – not "on whom the legal duty is imposed." *See Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is motors, brake shoes, steam generators and so forth. That subject is squarely within the preempted field, and so preempted.

that complied with those state standards. Railroads would likewise have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly what LIA and *Napier* forbid.

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulations would be undermined. . . .
>
> Imposing tort liability on railroad equipment manufacturers would . . . forc[e] them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts – a result the [LIA] was clearly intended to foreclose.

See Law, 114 F.3d at 910-13. Thus, exempting claims against manufacturers from the preempted field would make state, not federal, law the ultimate regulator; destroy uniformity; and leave locomotive design to "the varying and uncertain opinions and verdicts of juries" – the opposite of Congress's intent and exactly what its field preemption was intended to avoid.

As the California Supreme Court held, "[s]anctioning state common law actions against manufacturers would raise the same concerns for impairing nationwide uniformity essential to the regulation of railroads as would sanctioning such actions against operators." (App. 14a) Every circuit to address the question agrees and no state

appellate court holds otherwise. P. 7, above. There is, again, nothing to review.

Napier has been the law for over 70 years. Petitioners cite no case from any court that questions *Napier*'s controlling force over claims like these, and no case that would allow their claims to proceed. Petitioners present no issue to review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: September 28, 2000.

GRACE, GENSON, COSGROVE & SCHIRM, P.C.
PHILIP R. COSGROVE
THOMAS H. HUTCHINSON
DAVID K. SCHULTZ
444 South Flower Street, Suite 1100
Los Angeles, CA 90071
(213) 533-5400

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
DAVID M. HEILBRON*
LESLIE G. LANDAU
ROBERT A. BRUNDAGE
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Attorneys for Respondent General Motors Corporation
**Counsel of Record*